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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
10.01.2022	27.01.2022

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

T.C.A. Nos.1377 to 1380 of 2009

M/s. Dadha Pharma (P) Ltd.,
Rep. by its Managing Director,
Sri Mohan Chand Dadha.

... Appellant in all appeals

Vs.

1.The Income Tax Officer,
Company Circle 1(4).
Chennai-600 034.

2.The Income-tax Appellate Tribunal,
Chennai "A" Bench,
Chennai.

... Respondents in all appeals

T.C.A.No.1377 of 2009: Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 03.04.2009 made in Int.T.A.No.0013/Mad/2008 on the file of the Income Tax Appellate Tribunal, "A" Bench for the assessment year 1997-98.

T.C.A.No.1378 of 2009: Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 03.04.2009 made in Int.T.A.No.0014/Mad/2008 on the file of the Income Tax Appellate Tribunal, "A" Bench for the assessment year 1998-99.

T.C.A.No.1379 of 2009: Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 03.04.2009 made in Int.T.A.No.0015/Mad/2008 on the file of the Income Tax Appellate Tribunal, "A" Bench for the assessment year 1999-2000.

T.C.A.No.1380 of 2009: Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 03.04.2009 made in Int.T.A.No.0016/Mad/2008 on the file of the Income Tax Appellate Tribunal, "A" Bench for the assessment year 2000-01.

(In all appeals)



Prayer:-

Against the order dated 13/03/2008 of the The Commissioner of Income Tax (Appeals) VIII, Chennai in ITA Nos.151 to 154/07/08 Pertaining to Assessment years 1997-98, 1988-99, 1999-2000, 2000-2001 against the order of the In The Income Tax Officer (OSD), Company Circle 1(4). Chennai dated 11/12/2007 in PA/GIR NO.AAA CD 1265F.

For Appellant : Mr.A.Ramesh Kumar

For Respondent : Mr.T.Ravikumar, standing counsel

COMMON JUDGMENT

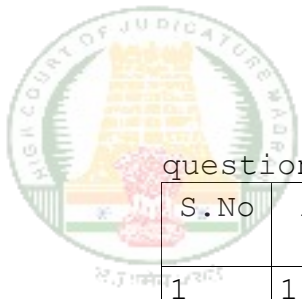
MOHAMMED SHAFFIQ, J.

We have heard the learned counsel for the appellant and the learned standing counsel appearing for the respondents and also perused the materials available on record.

2. These appeals are filed by the appellant/assessee questioning the legality and validity of the order dated 03.04.2009 passed by the Income Tax Appellate Tribunal under the Interest Tax Act, 1974.

3. The appellant was incorporated under the Companies Act, 1956 and engaged in the business of distribution of pharma products, besides finance, investments, etc. On 01.08.1996 they transferred the pharma distribution business to a new company called M/s Dadha Pharma Marketing Pvt. Ltd., while retaining the business of finance and investments. During the assessment years 1997-98, 1998-99, 1999-2000 and 2000-2001, the appellant had made loans and advances and credited interest in the profit and loss account. But, they had not filed returns under the Interest Tax Act, 1974.

4. According to the Assessing Officer, since the appellant carried on the business of finance and investment as a finance company as defined in section 2 (5B) of the Interest Tax Act and the interest earned by it was within the purview of section 2(7) of the Act, notices under Section 148 read with section 10 of the Interest Tax Act, 1974 came to be issued on the premise that chargeable interest had escaped assessment. In response to the same, the appellant filed its return disclosing 'nil' chargeable interest, stating that its principal business is not lending and financing and thus they do not come within the purview of the Interest Tax Act, 1974. Being dissatisfied with the same, the assessing authority rejected the plea of the appellant and passed the assessment orders for the assessment years in



question, the details of which are tabulated below:

S.No	Assessment Year	Chargeable interest	Interest payable
1	1997-1998	85,521/-	6,210/-
2	1998-1999	72,790/-	3,164/-
3	1999-2000	20,81,238/-	1,34,006/-
4	2000-2001	38,62,126/-	2,48,680/-

5. Aggrieved by the orders of the assessing authority, the appellant carried the matter by way of appeals and further appeals before the Appellate Authorities viz., Commissioner of Income Tax (Appeals)-VIII, Chennai and the Income Tax Appellate Tribunal respectively. The appellant reiterated its stand as raised before the assessing authority that its principal business is not lending and financing and thus, the appellant company does not come within the purview of the Interest Tax Act, 1974, before the Appellate Authorities. However, it was held by both the Appellate Authorities that the income earned on account of the interest was liable to tax under the Interest Tax Act, 1974. Taking note of the object of the company as set out in the Memorandum of Association coupled with the fact that interest was offered as business income in the return of income filed by the appellant for the assessment years in question; and the nature of business was declared as finance and investments in the audit report, the Appellate Authorities viz., the first appellate authority and the Tribunal confirmed the orders of the Assessing Officer and dismissed the appeals filed by the appellant.

6. Feeling aggrieved, the appellant / assessee has come forward with these tax case appeals, raising the following substantial questions of law:-

1. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in concluding that the reopening of assessment beyond the period of four years is valid in law as per section 10 of the Interest Tax Act, 1974?
2. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in concluding that the interest income as chargeable interest under section 2(7) read with section 2(5B) V-A of the Interest Tax Act, 1974 without considering the Memorandum of the Appellant Company, which does not contain the finance business?
3. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in concluding that the advances given were not in the nature of finance to attract the provisions of clause (ii) or (va) to section 2 (5B) of



the Interest Tax Act?

7. At the outset, it is pertinent to note that both the appellate authorities have treated the appellant as constituting "any other financial company" in terms of Section 2(5A)(iv) of the Interest Tax Act, 1974, thereby qualifying as a "taxable person" for the purpose of attracting the charge under the Interest Tax Act, 1974, though the assessments were made by the assessing authority, treating the appellant as a residuary non-banking finance company falling under section 2(5B) (va) of the Interest Tax Act, 1974.

8. To answer the above questions, it may be relevant to refer to the following provisions under the Interest Tax Act, 1974, which read as under:

"2. Definitions.—In this Act, unless the context otherwise requires,

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(5) 'chargeable interest' means the total amount of interest referred to in Section 5, computed in the manner laid down in Section 6;

(5-A) 'credit institution' means,—

(i) a banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in Section 51 of that Act);

(ii) a public financial institution as defined in Section 4-A of the Companies Act, 1956 (1 of 1956);

(iii) a State Financial Corporation established under Section 3 or Section 3-A or an institution notified under Section 46 of the State Financial Corporations Act, 1951 (63 of 1951), and

(iv) any other financial company;

(5-B) 'financial company' means a company, other than a company referred to in sub-clause (i), (ii) or (iii) of clause (5-A), being—

(i)

(ii)

(iii)

(iv) a loan company, that is to say, a company not being a company referred to in sub-clauses (i) to (iii) which carries on, as its principal business, the business of providing finance, whether by making loans or advances or otherwise;

(v)



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(v-a) a residuary non-banking company other than a financial company referred to in sub-clauses (i), (ii), (iii), (iv) or (v), that is to say, a company which receives any deposit under any scheme or arrangement, by whatever name called, in one lump sum or in instalments by way of contributions or subscriptions or by sale of units or certificates or other instruments or in any other manner; or

(vi) a miscellaneous finance company, that is to say, a company which carries on exclusively, or almost exclusively, two or more classes of business referred to in the preceding sub-clauses;

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(7) 'interest' means interest on loans and advances made in India and includes—

(a) commitment charges on unutilised portion of any credit sanctioned for being availed of in India; and

(b) discount on promissory notes and bills of exchange drawn or made in India,

but does not include—

(i) interest referred to in sub-section (1-B) of Section 42 of the Reserve Bank of India Act, 1934 (2 of 1934);

(ii) discount on treasury bills;

4. Charge of tax.—(1) Subject to the provisions of this Act, there shall be charged on every scheduled bank for every assessment year commencing on or after the 1st day of April, 1975, a tax (in this Act, referred to as interest tax) in respect of its chargeable interest of the previous year at the rate of seven per cent of such chargeable interest:

Provided that the rate at which interest tax shall be charged in respect of any chargeable interest accruing or arising after the 31st day of March, 1983 shall be three-and-a-half per cent of such chargeable interest.

(2) Notwithstanding anything contained in sub-section (1) but subject to the other provisions of this Act, there shall be charged on every credit institution for every assessment year commencing on and from the 1st day of April, 1992, interest tax in respect of its chargeable interest of the previous year at the rate of three per cent of such chargeable interest:

Provided that the rate at which interest tax shall be charged in respect of any chargeable interest



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accruing or arising after the 31st day of March, 1997 shall be two per cent of such chargeable interest.

(3) Notwithstanding anything contained in sub-sections (1) and (2), no interest tax shall be charged in respect of any chargeable interest accruing or arising after the 31st day of March, 2000.

5.Scope of chargeable interest.—Subject to the provisions of this Act, the chargeable interest of any previous year of a credit institution shall be the total amount of interest (other than interest on loans and advances made to other credit institutions or to any cooperative society engaged in carrying on the business of banking) accruing or arising to the credit institution in that previous year:

Provided that any interest in relation to categories of bad or doubtful debts referred to in Section 43-D of the Income Tax Act shall be deemed to accrue or arise to the credit institution in the previous year in which it is credited by the credit institution to its profit and loss account for that year or, as the case may be, in which it is actually received by the credit institution, whichever is earlier."

A cumulative reading of the above provisions would make it clear that the charge under the Interest Tax Act, 1974 would get attracted on every credit institution for every assessment year commencing from 01.04.1992 in respect of "Chargeable interest" of the previous year.

9. Such being the position of law, we are now inclined to look into the findings of the Authorities below, for better appreciation of the issue at hand and the same are reproduced hereinbelow:

Assessing authority

"... it has come to light that the assessee company is not a Finance Company as defined in section 2(5B) of the Interest Tax Act, 1974. As evidenced by its MOA, its principal business is not lending and finance business. Hence, the assessee company had claimed that although it carried on the activity of lending and investment during the FY 1998-99, it did not carry on the actual financing business warranting the application of Interest Tax Act.

... The advances in respect of last two parties as stated above pertained to buy back of shares of the company from them. But, on perusal of the details filed and clarifications given, it is ascertained that although the assessee is not attracted by the provisions of clause (ii) of sub-section (5B) of sec. 2 of Interest Tax Act,



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still it comes under the provisions of (va) of sub section (5B) of sec. 2 of Interest Tax Act, a residuary non banking finance company. As the income earned on account of interest is offered as business income in the return of income filed by the assessee ..., the interest income is exigible. Hence, the entire interest income is treated as chargeable interest as defined u/s 2(7) of the Interest Tax Act and assessed accordingly u/s 8(2) of the Interest Tax Act."

First Appellate Authority:

"7.... After the transfer of its Pharma Distribution business, the appellant was engaged in the business of Finance and Investment as evident from the returns of income and audit report filed along with the returns of income. The appellant company did not have any substantial income from any other activities except the interest received on the advances made by the company. In the circumstances, the AO is justified in treating the appellant as any other Finance Company and brought to tax the interest credited in the accounts. I therefore, confirm the action of the AO."

Tribunal:

"....On going through the above noted conclusion of Id. CIT(A), we find that the basis and reasoning as given by the Id. CIT(A) in this regard are sound and convincing who is found to have considered each and every aspect of matter in detail. Since neither any infirmity or flaw has been pointed nor noticed by this Bench, which could justify any interference in the conclusion as drawn by the Id. CIT(A) therefore, while concurring with the finding of the Id. CIT(A), we upheld his action and dismiss this ground of appeal of the assessee for all the years."

10. It appears from the aforesaid findings of the Authorities below that the assessing authority has proceeded with the case of the appellant on the premise that the appellant would fall within the meaning of "residuary non-banking financial company". Whereas, the first appellate authority confirmed the order of the assessing authority, treating the appellant as "any other financial company". The said order of the first appellate authority was affirmed by the Tribunal, by merely extracting the findings of the first appellate authority. Such course adopted by the Appellate Authorities does not appear to be correct, in the opinion of this court.

11. We find that the expression "financial company" as defined under section 2(5B) of the Interest Tax Act, 1974, means "a company" carrying on activities as enumerated in sub-clauses



(iv) to (v) thereon. Both the appellate authorities have not set out the sub-clause to the definition of "financial company" which covers the appellant company. The said aspect relating to identifying the "taxable person" is an essential criterion for the charge to get attracted. However, the appellate authorities failed to mention the sub-clause to Section 2(5B) of the Interest Tax Act, 1974, under which the appellant would fall. On this score alone, we are inclined to set aside the order of the Tribunal and remand the matter to the Tribunal for fresh consideration.

12. At this juncture, it is apt to refer to the decision of the supreme court in CWT v. Ellis Bridge Gymkhana (1998) 229 ITR 1 : (1997) 95 Taxman 143, in which, it was held that "the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section and no one can be taxed by implication".

13. In the light of the discussions held above, we set aside the order impugned herein and remand the matter to the Tribunal for fresh consideration. The Tribunal shall examine the facts as regards the activity of the appellant, and set out under which sub clause to the definition of "financial company" under section 2(5B), the appellant company would fall, so as to attract charge under the Interest Tax Act, 1974 and thereafter, pass appropriate orders. Such an exercise shall be completed within a period of twelve (12) weeks from the date of receipt of a copy of this judgment.

14. All these tax case appeals of the assessee are disposed of to the extent as indicated above. No costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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1. The Income Tax Officer,
Company Circle 1(4).
Chennai-600 034.

2. The Commissioner of Income Tax (Appeals) VIII
Chennai.



3. The Income-tax Appellate Tribunal,
Chennai "A" Bench,
Chennai.

4. The Income Tax Officer (OSD),
Company Circle 1(4).
Chennai-600 034.

+4cc to Mr.T.Ravikumar, Advocate, S.R.No.4529 to 4532
+1cc to Mr.T.Ravikumar, Advocate, S.R.No.1872
+2cc to Mr.A.Ramesh Kumar, Advocate, S.R.No.4671

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SRA(CO)
CT 14/02/2022